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# Second Circuit Rules Broad Forum Selection Clause Trumps FINRA Rule Requiring Arbitration

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On August 21, 2014, the United States Court of Appeals for the Second Circuit joined the Ninth Circuit in holding that FINRA rules requiring arbitration of customer disputes may be superseded by an agreement between a member and a customer containing a broad forum selection clause requiring all disputes to be heard in court.

In the two related cases – ***Goldman, Sachs & Co. v. Golden Empire Schools Financing Authority, et al., No. 13-797-cv, and Citigroup Global Markets Inc. v. North Carolina Eastern Municipal Power Agency, No. 13-2247-cv*** – the financial services firms and their customers entered into broker-dealer agreements providing that "all actions and proceedings" were to be brought in the United States District Court for the Southern District of New York. After the customers in both cases commenced FINRA arbitrations under FINRA Rule 12200, the firms successfully petitioned the district court to enjoin the arbitrations.

On appeal, although the Court recognized that FINRA Rule 12200 constitutes a binding agreement to arbitrate customer disputes that arise in connection with the business activities of a member, it reasoned, based on prior Second Circuit jurisprudence, that "an agreement to arbitrate is superseded by a later-executed agreement containing a forum selection clause if the clause 'specifically precludes' arbitration..." The Court found that the agreements at issue specifically precluded arbitration because their language was "all inclusive and mandatory," and thus "superseded the background FINRA arbitration rule."

The Court's decision presents potential benefits and risks for member firms. Among other things, the decision should give comfort to firms who wish to enter into agreements with their customers containing forum selection provisions requiring that disputes be resolved in court, rather than by FINRA dispute resolution. However, it remains to be seen whether FINRA will seek to ensure the viability of its customer arbitration procedures by means of FINRA IM-12000, which provides that "[i]t may be deemed conduct inconsistent with just and equitable principles of trade and a violation of Rule 2010 for a member or a person associated with a member to... fail to submit a dispute for arbitration under the Code as required by the Code."

Further, while the Second Circuit's decision is in accord with a recent decision of the Ninth Circuit, the Fourth Circuit has determined that a nearly identical forum selection clause does *not* supersede Rule 12200. *See Goldman, Sachs & Co. v. City of Reno*, 747 F.3d 733, 736 (9th Cir. 2014); *UBS Fin. Servs., Inc. v. Carilion Clinic*, 706 F.3d 319 (4th Cir. 2013). The resulting circuit

split may need to be resolved by the Supreme Court.